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CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
PORTLAND, OREGON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JOHN SCHAEFERS,
Plaintiff

v.

GARY WRIGHT, GEORGE BURKE, and the CITY OF FOREST GROVE, an Oregon Municipal Corporation, and JOHN DOE, a fictitious person,
Defendants

Civil No. 93-863-FR
(LEAD)

OPINION

RICHARD FREDERICKS,
Plaintiff,

v.

GARY WRIGHT, GEORGE BURKE, and the CITY OF FOREST GROVE, an Oregon Municipal Corporation, and JOHN DOE, a fictitious person,
Defendants.

Civil No. 93-1294-FR

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FRYE, Judge:

The matters before the court are the motions for summary judgment of the defendants, Gary Wright, George Burke and the City of Forest Grove, against the plaintiffs, John Schaefers (#17) and Richard Fredericks (#29).

UNDISPUTED FACTS

On March 20, 1992, the plaintiffs, John Schaefers and Richard Fredericks, went to the residence of Sam Fuller, an employee of the business ow[n]ed by Schaefers and Fredericks, S & J Chevrolet. A physical altercation occurred. Fuller dialed 911 and

reported that he was being assaulted. Defendants Gary Wright and George Burke were dispatched to Fuller's residence. Wright and Burke are police officers employed by the defendant, the City of Forest Grove. When Officers Wright and Burke arrived, they found Schaefers and Fredericks outside of the residence with two large mastiff dogs and Fuller inside of the residence with the door locked.

Officer Burke gained entry to the residence and spoke with Fuller. He observed that Fuller was frightened; that the interior of the house was in disarray; that Fuller's glasses were broken; and that Fuller was bleeding from the nose. In response to Officer Burke's questions, Fuller said that he was afraid to say what had happened, but he told Officer Burke to contact the Attorney General of the State of Oregon if he wanted more information. Fuller also told Officer Burke that he was not interested in pressing charges against Schaefers and Fredericks at that time, so Officer Burke left.

Shortly thereafter, Officer Burke spoke with an investigator from the office of the Attorney General of the State of Oregon. Officer Burke learned from the investigator that Schaefers and Fredericks and their business, S & J Chevrolet, were under investigation by the Attorney General for allegedly engaging in unlawful trade practices. Officer Burke was also told by the investigator that Schaefers and Fredericks probably thought that Fuller was cooperating with the Attorney General in his investigation.

After speaking with the investigator from the Attorney General's office, Officer Burke again talked to Fuller. On this occasion, Fuller told Officer Burke that he had changed his mind and wanted to press charges against Schaefers and Fredericks. Fuller stated that Schaefers and Fredericks had threatened him; had forced the door of his residence open; had pulled him outside; and had hit him on the nose, drawing blood and breaking his glasses.

On the evening of March 21, 1992, the day after the 911 dispatch to Fuller's residence, Officers Burke and Wright and another member of the Forest Grove Police Department, went to Fredericks residence and arrested him without an arrest warrant for the commission of various felonies. The police officers were in uniform.

The facts surrounding the arrest of Fredericks are in dispute.

On the same night, Officers Burke and Wright and another member of the Forest Grove Police Department went to Schaefers' residence. They were in uniform. Officer Burke knocked on the front door of Schaefers' residence, and when Schaefers responded, he was told that he needed to talk to Officer Burke about what had happened the night before. Schaefers told Officer Burke to come into his house. Once inside the house, Officer Burke placed Schaefers under arrest for the crimes of burglary and kidnapping. Officer Burke did not have an arrest warrant.

A Washington County grand jury subsequently indicted Schaefers and Fredericks for the crimes of burglary in the first degree, assault in the fourth degree, harassment, and criminal mischief as a result of the events that had occurred at the home of Sam Fuller. Sometime later, Schaefers and Fredericks entered into a civil compromise with Fuller, paying him $9,900.[1]

Pursuant to 42 U.S.C. § 1983, Schaefers alleges that defendants Wright and Burke and one "John Doe" violated his constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution because they arrested him in his home without an arrest warrant and in the absence of exigent circumstances. Defendant the City of Forest Grove is named as a "proxy defendant on behalf of defendants Wright, Burke and Doe as required by O.R.S. 30.265(1)." Complaint of Schaefers, para. 5.

Fredericks brings his action pursuant to 42 U.S.C. § 1983 and the common law of the State of Oregon. Fredericks alleges that defendants Wright, Burke and one "John Doe" violated his constitutional rights under 42 U.S.C. § 1983 because they arrested him in his home without an arrest warrant and in the absence of exigent circumstances. He alleges that the defendant, the City of

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1/ As a result of the civil compromise, the criminal charges against Schaefers and Fredericks were dismissed. Schaefers and Fredericks, however, are still under investigation by the Attorney General. They are attempting to negotiate a settlement with the Attorney General.

Forest Grove, maintains a policy and procedure of not obtaining warrants for arrests made in the residences of persons suspected of committing crimes.

Fredericks also alleges a state law claim against the three officers for the intentional infliction of emotional distress. Fredericks alleges that the officers "repeatedly stalked the plaintiff without reasonable suspicion or probable cause" and write him a "false" parking ticket. Complaint of Fredericks, para. 17. Fredericks alleges that these acts were extraordinary transgressions of the bounds of socially tolerable conduct. Based on the same facts, Fredericks alleges a claim for the reckless infliction of emotional stress.

APPLICABLE STANDARD

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. p. 56(c). On a motion for summary judgment, it is not the function of this court to weigh the evidence and determine the truth; rather, the court must "determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge...The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255.

CONTENTIONS OF THE PARTIES

Officers Wright and Burke contend that they are entitled to an order of summary judgment based on the defense of qualified immunity. They argue that Schaefers and Fredericks have not demonstrated that Officers Wright and Burke violated a clearly estab-

lished constitutional principle. The City of Forest Grove argues that because Officers Wright and Burke did not violate any clearly established constitutional principle, Schaefers and Fredericks have no viable claim against the City of Forest Grove. Schaefers and Fredericks argue that when the defendant police officers arrested them, the police officers violated their Fourth Amendment rights.

Furthermore, Officers Wright and Burke argue that Fredericks has failed to state sufficient facts to state a claim for the intentional or reckless infliction of emotional distress because the conduct of the police officers did not exceed the bounds of socially tolerable behavior. Fredericks argues that the facts are sufficient to state a claim.

ANALYSIS AND RULING

1. The Standard for the Defense of Qualified Immunity

The police officers have raised as a defense the issue of qualified immunity. The defense of qualified immunity shields government officials from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). It is the plaintiff's burden to demonstrate that the alleged conduct violated clearly established law. "[T]he plaintiff must show that the particular facts of his case support a claim of clearly established right." Backlund v. Barnhart, 778 F. 2d 1386, 1389 (9th Cir. 1985) (emphasis in original). It is not sufficient that the plaintiff simply identify a clearly established right in the abstract and allege that the defendant has violated it. Anderson v. Creighton, 483 U.S. 635, 639-40 (1987). The plaintiff is required to demonstrate a "substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." Hilliard v. City and County of Denver, 930 F. 2d 1516, 1518 (10th Cir. 1991). The plaintiff must establish that the alleged unlawfulness was "apparent" in the light of preexisting law. Anderson, 483 U.S. at 640. If the plaintiff cannot demonstrate that the law allegedly violated was

clearly established, defendant police officers are entitled to immunity. Id. at 641.

2. The Defense of Qualified Immunity as Applied to the Arrest of Schaefers

Schaefers alleges that the police officers acted unlawfully when they entered his home for the purpose of arresting him without a warrant for arrest. The facts with respect to the arrest of Schaefers are undisputed. They are as follows: Officer Burke knocked on Schaefers front door. Schaefers responded to the knock. Officer Burke told Schaefers, "I'd like to talk to you for a minute. May I come in?" Exhibit A to Defendants' Motion for Summary Judgment Against Plaintiff Schaefers, p. 4. Schaefers said, "Yes." Id. Once inside, Officer Burke placed Schaefers under arrest for the crimes of burglary and kidnapping. Officer Burke did not have a warrant for the arrest of Schaefers.

Schaefers argues that Officer Burke violated clearly established law by gaining entry in this manner. In particular, Schaefers argues that in stating, "I'd like to talk to you for a moment. May I come in?," Officer Burke obtained consent to enter the house by misrepresentation. Schaefers argues that because Officer Burke stated that he would like to "talk" to Schaefers, rather than stating that he would like to "arrest" Schaefers, Officer Burke misrepresented the true nature of his visit, and therefore the consent that Schaefers gave to enter the residence is void ab initio.

In support of this argument, Schaefers relies upon United States v. Bosse, 898 F.2d 113 (9th Cir. 1990) (state agent misrepresented the identity of a federal agent in obtaining consent); United States v. Little, 753 F.2d 1420 (9th Cir. 1984) (entry gained by misrepresentation involving infiltration by an undercover officer of the IRS); United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974) (officers obtained consent by misrepresenting intent to investigate burglary which had not occurred); Johnson v. United States, 333 U.S. 10 (1984) (officers cannot use consent to enter for the purpose of talking to suspect to justify an arrest without probable cause

by using the fruits of subsequent non-consensual search); and Lewis v. United States, 385 U.S. 206 (1966) (an undercover agent may accept invitation to enter a home for the purposes contemplated by the occupants).

None of these cases, however, require the court to conclude that Officer Burke's entry in this case was unconstitutional. Schaefers does not argue that Officer Burke lacked probable cause to arrest him. Although Schaefers argues that entry was gained by misrepresentation, he does not set forth any statement made by Officer Burke or any other officer that amounts to a misrepresentation. Finally, Schaefers fails to cite any case in which a court hold that when a police officer tells a suspect that he wants to "talk" to him, the police officer is misrepresenting the scope, nature or purpose of the investigation that the police officer wants to make.

In United States v. Briley, 726 F.2d 1301 (8th Cir. 1984), the United States Court of Appeals for the Eighth Circuit held that it was not a misrepresentation for police officers to gain entry to a residence by saying they had "important matters to discuss with [defendant]," when in fact they intended to arrest him. Id. at 1304. The court pointed out that "[t]he officers had a right to go about their duties 'without gratuitously advertising [their] every move to anyone [they] might encounter.'" Id. at 1305.

The Briley court also addresses the issue of whether the arrest exceeded the scope of the consent to enter. Like Briley, Schaefers argues here that although the police officers may have been given consent to enter the home, they were never given consent to arrest Schaefers. The Briley court concluded that such an argument is without foundation:

> To adopt Briley's argument would be to say that the police may never validly arrest a person in his or her home based on consent unless the officers specifically ask for permission to enter to arrest the suspect. Such a result cannot be squared with Payton since Payton clearly implies that a consensual entry will justify a warrantless in-home arrest. The Payton Court's primary

concern was with inviolability of a person's home and a warrantless entry.

726 F.2d at 1305 n.2 (emphasis in original).

Based on Briley and the failure of Schaefers to cite any relevant law to the contrary, the court finds that Schaefers has not demonstrated that the law he claims was violated was, in fact, clearly established law; therefore, the defendant police officers are entitled to qualified immunity under the test set out in Harlow.

3. The Defense of Qualified Immunity as Applied to the Arrest of Fredericks

Fredericks also alleges that the police officers acted unlawfully when they entered his home for the purpose of arresting him without a warrant for his arrest. There are two versions of the facts before the court. The conflicting versions of the arrest are not material and do not create a triable issue of fact because, as will be shown below, neither version of the facts defeats the qualified immunity of the police officers.

According to Officer Burke, Steve Thompson, a guest at Fredericks house at the time of his arrest, answered the door in response to Officer Burke's knock on the door. Fredericks testified at deposition that when he heard the knock on his front door, he asked Thompson to answer the door saying to Thompson, "Steve, can you see who's there?' Exhibit A to Defendant's Motion for Summary Judgment Against Plaintiff Fredericks, p. 16.[2] When Thompson reached the door, he saw the police officers in full uniform through the glass. When Thompson opened the door, Officer Burke asked if he could come in, to which Thompson replied, "Yes." Id., Exhibit D, p. 2. After being invited in, Officer Burke asked if Fredericks was at home and, as he was doing so, Fredericks ap-

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2/ A recent affidavit of Fredericks suggests that Thompson, in fact, did not have consent to answer the door. Exhibit B to Plaintiff Fredericks' Concise Statement of Facts in Support of Opposition, pp. 3-4. Fredericks cannot create an issue of fact by impeaching previously given deposition testimony. See Radobenko v. Automated Equip. Corp., 520 F.2d 540 (9th Cir. 1975).

peared. Id. at 2-3.

It is well established that consent may be valid under an agency theory. See United States v. Baswell, 792 F.2d 755, 759 (8th Cir 1986), citing Stoner v. California, 376 U.S. 483, 488-89 (1964). Based on the deposition testimony of Fredericks that he asked Thompson to see who was at the door, the court finds that Thompson was acting as an agent of Fredericks when he answered the knock at the front door of the house and allowed the police officers to enter.

Fredericks, like Schaefers, argues that the police officers exceeded the consent given to them to enter the home when they arrested Fredericks, and that the police officers engaged in a constitutional ruse, misrepresenting the fact that they had come to arrest Fredericks by failing to announce that purpose as their specific purpose for entering the house. In support of these arguments, Fredericks cites the same cases as Schaefers. These cases and the applicable law have been discusses above. Under this version of the facts surrounding the arrest of Fredericks, Fredericks has not demonstrated that any clearly established law was violated. Therefore, the defendant police officers are entitled to qualified immunity under the test set out in Harlow.

In the second version of the facts, Thompson attested that when he opened the front door in response to the knock, one of the police officers asked for Fredericks. Before he could respond, Fredericks walked up to the door saying, "Hi, I'm Mr. Fredericks [sic]." Exhibit F to Defendants' Motion for Summary Judgment Against Plaintiff Fredericks, p. 5. Thompson further attested that while the police officers stood on the front porch, they told Fredericks that he was under arrest. Id. at 6-7.

The defendant police officers contend that they are entitled to qualified immunity even if the arrest occurred while they were on the steps of the house. The police officers argue that a warrantless arrest, without entering the residence of Fredericks, is constitutional. In Payton v. New York, 445 U.S. 573, 585-86 (1980), the United States Supreme Court discusses the Fourth Amendment as

follows:

> As the Court reiterated just a few years ago, the "physical entry of the home is the chief evil against which the working of the Fourth Amendment is directed." And we have long adhered to the view that the warrant procedure minimizes the danger of needless intrusions of that sort. (Citation omitted).

Based on this principle, courts have routinely held that neither Payton nor the United States Constitution prohibit a police officer from standing outside a home, knocking on a door, and arresting on occupant when he opens the door in response to this knock, even if he is still standing in the doorway. See United States v. Whitten, 706 F.2d 1000, 1015 (9th Cir. 1983) (no warrant was required where agents of the DEA knocked on defendant's door and immediately arrested him when he opened it); United States v. Mason, 661 F.2d 45, 47 (5th Cir. 1981) (arrest was held constitutional without a warrant where defendant came to the front door as agents approached the house, and he was arrested in the doorway); and United States v. Carrion, 809 F.2d 1120, 1128 (5th Cir. 1987) (arrest was not a violation of Payton where agents knocked on the door of the defendant's hotel room and arrested him when he opened the door).

In a recent decision on this issue, the United States Court of Appeals for the Seventh Circuit held that "Payton prohibits only a warrantless entry into the home, not a policeman's use of his voice to convey a message of arrest from outside the home." United States v. Berkowitz, 927 F.2d 1376, 1386 (7th Cir. 1991) (emphasis in original). The court also held that an entry by police after the defendant has submitted to the arrest is constitutional:

> When the police assert from outside the home their authority to arrest a person, they have not breached the persons privacy interest in the home. It the person recognizes and submits to that authority, the arrestee, in effect, has forfeited the privacy of his home to a certain extent. At that point, it is not unreasonable

> for the police to enter the home to the extent necessary to complete the arrest. A person who has submitted to the police's authority and stands waiting for the police to take him away can hardly complain when the police enter his home briefly to complete the arrest.

Id. at 1387.

In order to defeat a claim of qualified immunity, Fredericks must establish that the alleged unlawfulness was "apparent" in the light of pre-existing law. Anderson, 483 U.S. at 640. From the Berkowitz case cited above, even if a jury was to accept Fredericks' version of the facts, he has not demonstrated that a clearly established law was violated by his arrest from the doorstep of his residence. Moreover, a reasonable police officer could have believed that the actions he took were lawful under the circumstances. Thus, neither part of the test set out in Harlow has been established by Fredericks, and the police officers are entitled to qualified immunity.

4. The Claim of Schaefers Pursuant to 42 U.S.C. § 1983 Against the City of Forest Grove as a "Proxy Defendant"

Schaefers does not make a independent claim against the City of Forest Grove, naming it only as a "proxy defendant" under Oregon's Tort Claims Act, O.R.S. 30.265(1). Despite the citation to O.R.S. 30.265(1), Schaefers alleges no state law claims in his complaint; his sole theory is based upon 42 U.S.C. § 1983.

Municipal liability in an action brought under 42 U.S.C. § 1983 cannot be premised upon the mere fact that the municipality employed the offending individual. Monell v. Department of Social Servs., 436 U.S. 658, 684 (1978). Because there is no direct allegation against the City of Forest Grove, it is entitled to an order of summary judgment under Monell.

5. The Claim of Fredericks Pursuant to 42 U.S.C. § 1983 Against the City of Forest Grove

In action brought under 42 U.S.C. § 1983, municipalities may be held liable for injuries inflicted pursuant to "government's policy

or custom." Monell, 436 U.S. at 694. To impose liability on a municipality for failing to act to preserve constitutional rights, Fredericks must establish 1) that he possessed a constitutional right of which he was deprived; 2) that the City of Forest Grove had a policy; 3) that this policy amounts to "deliberate indifference" to his constitutional right; and 4) that the policy is the "moving force [behind] the constitutional violation." City of Canton, Ohio v. Harris, 489 U.S. 378, 389 (1989). Based on the foregoing analysis of the claims of Fredericks, the court finds that Fredericks has failed to establish that he was deprived of any constitutional right by the City of Forest Grove. Since the police officers did not violate the constitutional rights of Fredericks, then the City of Forest Grove is entitled to summary judgment. See Los Angeles v. Heller, 475 U.S. 796 (1986).

6. The Claims of Fredericks for the Intentional or Reckless Infliction of Emotional Distress

Fredericks alleges that the defendants intentionally inflicted emotional distress upon hem when they performed the following acts: stalked him without reasonable suspicion or probable cause; wrote a parking ticket citing him for parking too far from the curb; failed to appear at the time set for trial on the parking ticket; regularly drove by his residence; and followed him on one occasion through the City of Forest Grove.

The defendants contend that the allegations made by Fredericks fail to state a claim for the intentional infliction of emotional distress. In order to state a claim for the intentional infliction of emotional distress, a plaintiff must allege as follows: 1) that the defendant intended to inflict upon the plaintiff severe emotional distress; 2) that the acts of the defendant were the cause of the plaintiff's severe emotional distress; and 3) that the acts of the defendant constituted an extraordinary transgression of the bounds of socially tolerable conduct. Sheets v. Knight, 308 Or. 220, 236, 779 P.2d 1000 (1989).

The primary issue in this case is whether Fredericks has sufficiently pled the third prong of the Sheets test. Conduct which

exceeds the bounds of socially tolerable conduct is outrageous conduct. The Oregon courts require "an extremely outrageous transgression of social norms" in order for a plaintiff to state a claim for the intentional infliction of emotional distress. Rice v. Comtek Mfg. of Oregon, Inc., 766 F. Supp. 1539, 1543 (D. Or. 1990). The court cannot find, based upon the allegations made by Fredericks, that the behavior alleged rises to the level of an extraordinary transgression of the bounds of socially tolerable conduct as defined under the laws of the State of Oregon.

Fredericks has also alleged a claim for the reckless infliction of emotional distress. The tort of the reckless infliction of emotional distress allows recovery for severe emotional distress where the behavior directed toward a plaintiff has exceeded the bounds of socially tolerable conduct and there is a special relationship between the parties or a violation of a legally protected interest or known legal right. Hammond v. Central Lane Communications Ctr., 312 Or. 17, 27, 816 P.2d 593 (1991). Because Fredericks has failed to allege facts to support the requirement that the acts of the defendants constituted an extraordinary transgression of the bounds of socially tolerable behavior, he cannot maintain a claim for this tort.

CONCLUSION

The motions of the defendants for summary judgment against Schaefers (#17) and Fredericks (#29) are granted.

DATED this 22nd day of April 1994.

Helen J. Frye
United States District Judge